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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

ENERGY WEST, INC.,

Petitioner,

v.

DELORES TACKE,

Respondent.

On Petition for Writ of Certiorari to the Montana Supreme Court

PETITION FOR WRIT OF CERTIORARI

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May 24, 2010

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QUESTION PRESENTED FOR REVIEW

Whether a court can award attorneys' fees pursuant to the Fair Labor Standards Act where the Petition for Attorneys' Fees is supported by an Affidavit from counsel stating only the total lump sum number of hours spent on the entire litigation without providing contemporaneous time records reflecting the hours expended and the nature of the work done on each date work was performed.

RULE 29.6 STATEMENT

Energy West's parent company is Energy, Inc.

Energy, Inc. is a publically traded company and it is the parent company of Energy West, i.e., Energy, Inc. owns 100% of the stock of Energy West.

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OPINIONS BELOW

The original Judgment dated November 25, 2008, which reflects the jury's November 14, 2008 verdict, was not officially reported but is reproduced in the Appendix at E. The District Court's July 22, 2009 Order regarding attorneys' fees and costs was not officially reported and is reproduced in the Appendix at B. The Opinion of the Montana Supreme Court was published and can be found at 355 Mont. 243, 227 P.3d 601 (2010) and is reproduced in the Appendix at A.

JURISDICTIONAL STATEMENT

Petitioner respectfully requests that this Court grant their Petition for a Writ of Certiorari to review the Montana Supreme Court Decision regarding the award of attorneys' fees to Respondent in *Tacke v. Energy West, Inc.*, 355 Mont. 243, 227 P.3d 601 (2010) which was decided on February 23, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a) because the decision was decided applying federal law.

STATUTORY PROVISION INVOLVED

29 U.S.C. §216(b)

Damages; right of action; attorneys' fees and costs... The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow reasonable attorneys' fees to be paid by the defendant, and costs of the action...

STATEMENT OF THE CASE

Respondent filed this action against Petitioner in state court in the Eighth Judicial District, County of Cascade, State on Montana alleging violations of the federal Fair Labor Standards Act, 29 U.S.C. §201 et seq. (hereinafter "FLSA"). Respondent alleged that she had been misclassified as an exempt employee and was seeking to recover unpaid overtime compensation for hours she had worked in excess of 40 hours per week but for which she had not been paid at the rate of one and one-half times her regular hourly rate as required by the FLSA. After the District Court denied cross-motions for summary judgment, the matter proceeded to a jury trial. The jury returned a verdict in favor of Respondent in the amount of $35,220.00 as is reflected in the Judgment entered on November 25, 2008, which is attached hereto as Appendix E and the Amended Partial Judgment entered on December 4, 2008, which is attached hereto as Appendix D.

A hearing was held on January 12, 2009 regarding the award of costs and liquidated damages, after which the District Court entered a Second Amended Partial Judgment on January 15, 2009 awarding an additional $35,220 in liquidated damages and $4,958.73 in costs to Respondent. A copy of the Second Amended Partial Judgment is attached as Appendix C. The court entered a Final Judgment on July 21, 2009, when it issued an Order awarding an additional $4,372.10 in expert witness fees, $1,147.10 for travel expenses for Attorney Howard Strause, $95,737.50 in attorneys' fees for Attorney Elizabeth Best and $90,675.00 in attorneys' fees for Attorney Howard Strause. A copy of the July 21, 2009 Order for attorneys' fees is

attached as Appendix B. The total judgment, including attorneys' fees and costs is for $267,330.43.

On August 17, 2009, Energy West filed a Notice of Appeal with the Supreme Court of the State of Montana from the various judgments cited above, including the July 21, 2009 Order on attorneys' fees. On February 23, 2010, the Supreme Court of the State of Montana issued its Opinion upholding the verdict of the District Court in all regards in *Tacke v. Energy West, Inc.*, 355 Mont. 243, 227 P2d 601 (2010).

1. Statement of Facts and Issues

Respondent has been employed by Petitioner in various positions since 1970. During the period of time relevant to this lawsuit, Respondent was responsible for running Petitioner's credit department. In 1997, Respondent switched from being paid as an hourly employee to being paid as a salaried employee. At that same time, Petitioner began paying Respondent as if she was exempt from the FLSA's requirements that employees be paid overtime for hours worked in excess of 40 hours per week.

In 2004, Petitioner began questioning whether Respondent was properly classified as an exempt employee. As a result, she was temporarily returned to an hourly status based on an internal determination that she did not meet the requirements of the executive exemption. Upon further analysis, however, Petitioner subsequently determined that Respondent was exempt pursuant to the administrative exemption and returned her to her salaried status under which she was not paid overtime.

Respondent ultimately brought this claim in state court seeking to recover unpaid overtime compensation to which she believed she was entitled pursuant to the federal FLSA. The matter was tried in state court applying the federal substantive law of the FLSA. The principal issues at trial were whether Respondent qualified as an exempt employee, and, if she did not, what was the amount of unpaid overtime compensation to which she was entitled. The jury returned a verdict in Respondent's favor, determining that she was not properly classified as an exempt administrative employee, and awarded her $35,220 in unpaid overtime compensation.

Subsequent to the jury trial, the parties undertook post judgment proceedings addressing whether Respondent was entitled to liquidated damages and/or attorneys' fees.

Respondent submitted a petition for attorneys' fees that included affidavits from both of her counsel, Attorneys Howard F. Strause and Elizabeth Best. Neither the petition nor Attorney Strause's or Best's affidavits provided any contemporaneous billing records breaking down the number of hours of work performed in connection with any particular activities on any particular dates. Rather, Attorney Strause's affidavit provided that he had "reasonably expended 397.14 hours, to date, in the representation of Plaintiff" and Elizabeth Best's affidavit provided that she had "reasonably expended 405 hours, to date, in the representation of the Plaintiff." Both Attorney Best and Attorney Strause testified at the July 21, 2009 attorneys' fees hearing that they had also worked additional hours dealing with the post trial issues, but did not provide any detailed breakdown of how those

hours were spent. These lump sum hourly totals were the only information submitted by Respondent which the District Court could rely on in determining the number of hours Respondent's counsel had spent on the litigation. The District Court accepted the total number of hours attested to by Respondent's counsel and awarded a total of $186,412.50 in the July 21, 2009 Order regarding attorneys' fees. The District Court reached this total by multiplying the total number of hours worked by Attorneys Strause and Best by an hourly rate of $225.00 per hour.

Petitioner appealed the jury's verdict, the award of liquidated damages and the award of attorneys' fees and costs to the Montana Supreme Court. With respect to the attorneys' fee issue which is the subject of this Petition for Writ of Certiorari, Petitioner argued that Respondent had not met her burden of proof in connection with her petition for attorneys' fees. Petitioner argued that in utilizing the lodestar method for calculating attorneys' fees, the Respondent had the burden of supporting her request with contemporaneous time records reflecting, for each attorney, the hours expended and the nature of the work done. Because the Respondent had simply submitted lump sum hourly totals, the District Court had no ability to assess the time spent on each activity to determine whether the work undertaken with respect to each activity was reasonable or make any determination as to whether Attorney Strause and Best unnecessarily duplicated efforts with respect to any particular tasks. While the Montana Supreme Court was critical of Respondent's counsels' failure to submit detailed billing records, it ultimately refused to apply a per se rule requiring that such detailed information be submitted, and upheld the District

Court's award of attorneys' fees based on the evidence submitted:

> The District Court conducted a careful review of the fee issue and we conclude that it exercised conscientious judgment and did not clearly err in evaluating the evidence or abuse its discretion in approving the fee award. However, while we do not adopt a per se rule as some courts have done, we strongly urge counsel to keep and provide contemporaneous time records in support of attorneys' fees requests and fee-shifting cases, and we encourage District Courts to look askance at requests not so supported.

Tacke v. Energy West, Inc., 355 Mont. 243, 254, 227 P2d 601, 610 (2010).

REASON FOR GRANTING THE PETITION

> A court cannot award attorneys' fees pursuant to the Fair Labor Standards Act where the Petition for Attorneys' Fees is supported by an Affidavit from counsel stating only the total lump sum number of hours spent on the entire litigation without providing contemporaneous time records reflecting the hours expended and the nature of the work done on each date work was performed.

This Court has recognized that the general rule in the American legal system is that each party must pay its own attorneys' fees and expenses. *Perdue v. Kenny A.*, ___U.S. ___, ___, 130 S.Ct. 1662, ___, 176 L.Ed.2d 494, 504 (2010). Congress, however, has enacted

various federal laws which abrogate this common law rule, and provide that prevailing parties can recover their attorneys' fees. Among the laws which allow prevailing plaintiffs to recover attorneys' fees is the FLSA, which provides that the District Court "shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow reasonable attorneys' fees to be paid by the defendant, and costs of the action." 29 U.S.C. §216(b). Like other statutory provisions providing for attorneys' fees, the FLSA does not set forth a specific framework for determining how a reasonable attorneys' fee should be calculated. The task of identifying an appropriate methodology for determining a reasonable attorneys' fee was therefore left to the courts. *Perdue* ___ at ___, U.S. at ___, 130 S.Ct. at ___, 176 L.Ed.2d at 504.

This Court recently recognized that the lodestar method for calculating attorneys' fees has "achieved dominance in the federal courts" and has "become the guiding light of [the Supreme Courts'] fee shifting jurisprudence." *Perdue*, ___, ___U.S. at ___, 130 S.Ct. at ___, 176, L.Ed.2d at 504 quoting *Gisbrecht v. Barnhart*, 535 U.S. 789, 801 (2002).

The lodestar method of calculating attorneys' fees provides that the attorneys' fee award is "the product of reasonable hours times a reasonable rate." *City of Burlington v. Dague*, 505 U.S. 557, 559-560 (1992) quoting *Pennsylvania v. Delaware Valley Citizen's Counsel for Clean Air*, 478 U.S. 546, 565 (1986). This Court has not, however, ever spoken to the issue of what evidence must be submitted by the party petitioning for attorneys' fees to prove the reasonable number of hours expended on the litigation. Lower federal courts, however, have held that the "plaintiff

has the burden of proving in the first instance the extent and reasonableness of requested attorneys' fees with meticulous and contemporaneous time records." *Sheets v. Salt Lake County*, 45 F.3d 1383, 1391 (10th Cir. 1995). The Montana Supreme Court, in this case, however, refused to apply a per se rule that counsel provide contemporaneous time records in support of attorneys' fees requests in fee shifting cases, even though it was applying federal law pursuant to the FLSA. *Tacke v. Energy West, Inc.*, 355 Mont. 243, 254, 227 P.3d 601, 610 (2010).

This Court has recognized one of the advantages of the lodestar method for calculating an attorneys' fee award is the fact that it "produces an award that roughly approximates the fee that the prevailing attorney would have received if he or she had been representing a paying client who was billed by the hour on a comparable case." *Perdue*, __ U.S. __, 130 Ct. at __, 176 L.Ed.2d at 505. Moreover, the lodestar method "cabins the discretion of the trial judges, permits meaningful judicial review, and produces reasonably predictable results." *Id.* In the case at bar, Respondent's failure to provide a detailed breakdown of how the hours were spent in the litigation prevents appellate courts any opportunity to undertake a meaningful review of whether the time was reasonably spent. Moreover, it prohibits the awarding court from undertaking any meaningful analysis as to how the total number of hours was calculated.

Federal circuit courts have regularly held that fee petitions must be supported with some level of detail demonstrating how the total number of hours has been calculated. For example, the Tenth Circuit held that "counsel seeking fees must keep contemporaneous and

detailed records of their time...[explaining]...how many hours were spent researching, how many interviewing the client, how many drafting the complaint, and so on." *Sussman v. Patterson*, 108 F.3d 1206, 1212 (10th Cir. 1997) quoting *Ramos v. Lamm*, 713 F.2d 546, 553 (10th Cir. 1983).

As far back as 1984, the First Circuit put attorneys on notice "that henceforth, in cases involving fee applications for services rendered after the date of this Opinion, the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction of any award or, in egregious cases, disallowance." *Gendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984). The Second Circuit made a similar pronouncement in 1983, holding that "hereafter, any attorney – whether a private practitioner or an employee of a non-profit law office – who applies for court-ordered compensation in this circuit for work done after the date of this Opinion, must document the application with contemporaneous time records. These records should specify, for each attorney, the date, the hours expended, and the nature of the work done." *New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F. Supp. 2d 1136, 1148 (2d Cir. 1983).

Circuit courts have likewise upheld the denial of fee requests where the information submitted is insufficient. In *Vocca v. Playboy Hotel of Chicago, Inc.*, 686 F.2d 605, 608 (7th Cir. 1982), the Seventh Circuit rejected a fee application where the fee schedule "failed to set forth a sufficient description of the type of work performed." The court went on to hold that "counsel seeking statutory attorneys' fees has the duty to maintain accurate and detailed time records. It is

not enough to offer a rough estimate of the time expended and then explain discrepancies that arise with claims that they were offset in other places. Such claims are impossible to refute. District courts, entrusted with the task of ordering an unsuccessful litigant to pay the reasonable attorneys' fees of his opponent, may properly demand that a claim for such fees be fully supported by accurate and detailed records. When it is not, the request may be denied." *Vocca*, 686 F.2d at 608.

The United States Court of Appeals for the District of Columbia has recognized that the purpose of submitting the detailed records is "to permit the district court to make an independent determination whether or not the hours claimed are justified." *National Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982). In the case at bar, the Montana Supreme Court's refusal to require prevailing parties who are seeking fees pursuant to federal law to submit contemporaneous time records, undermines the rationale of the lodestar procedure. This Court has approved the lodestar method of calculating attorneys' fees specifically because it provides an objective basis for awarding the fees rather than giving the lower courts unfettered discretion. See *Perdue*, ___U.S. at ___, 130 S.Ct. at ___, 176 L.Ed. 2d at 504-505, recognizing the court's rejection of methods of calculating fees that "placed unlimited discretion in trial judges" in favor of the lodestar calculation which is "objective."

Lower courts, in implementing the lodestar approach to the attorneys' fee awards adopted by the United States Supreme Court, have recognized that it is important for courts to undertake a meaningful

analysis of the hours submitted to determine if they were reasonable. The Eleventh Circuit has held that time expenditures ought to be set out with sufficient particularity so that the district court can assess the time claimed for each activity. *Norman v. Housing Auth.*, 836 F.2d 1292, 1303 (11th Cir. 1988). The trial court should examine the reasonableness of hours allotted to each specific task. *Ramos*, 713 F.2d at 554. In situations where there are multiple attorneys working on the case, courts can reduce the total hours claimed if there is a duplication of efforts. *Davis v. City and County of San Francisco*, 976 F.2d 1536, 1544 (9th Cir. 1992). The practice undertaken by Respondent's counsel in this case does not allow any of this type of required analysis.

The practice of allowing counsel for prevailing parties to submit a single, lump sum total of hours spent on the entire litigation in connection with a fee shifting scheme provided by federal law will undermine the purpose of the lodestar method adopted by this Court. The Montana Supreme Court, in failing to follow the federal precedent, undermines the effectiveness of the fee shifting provisions of the FLSA set forth in 29 U.S.C. §216(b).

This Court possesses jurisdiction to review state court determinations that rest upon federal law. *Oregon v. Guzek*, 546 U.S. 517, 521 (2006) citing 28 U.S.C. §1257(a). The Montana Supreme Court's failure to follow clear federal precedent in enforcing the FLSA undermines the principles of federal law adopted by this Court in conjunction with issuing fee awards under fee shifting statutory provisions of federal law. Because this Court has never directly addressed the evidence which a party must submit to

support the calculation of the number of hours spent on the litigation, this Court should grant Petitioner's Writ for Certiorari to require parties seeking attorneys' fees pursuant to federal law, to support their petition with contemporaneous time records setting forth, for each attorney, the time spent on each activity on each date for which the party is seeking attorneys' fees.

CONCLUSION

For all the reasons set forth herein, Petitioner respectfully requests that this Court grant Petitioner's Writ for Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 09-0456
2010 MT 39

[Filed February 23, 2010]

DELORES TACKE,
Plaintiff and Appellee,

v.

ENERGY WEST, INC.,
Defendant and Appellant.

APPEAL FROM: District Court of the Eighth Judicial District, In and For the County of Cascade, Cause No. BDV 05-1064 Honorable Julie Macek, Presiding Judge

COUNSEL OF RECORD:

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Submitted on Briefs: January 13, 2010

Decided: February 23, 2010

Filed:

Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Energy West, Inc. appeals from a jury verdict and subsequent District Court orders entering a judgment in favor of its employee, Delores Tacke, for overtime wages, liquidated damages, costs, and attorneys' fees under the Fair Labor Standards Act (FLSA). We affirm.

¶2 Energy West presents five issues on appeal, which we restate as follows:

¶3 *1. Did the District Court err in denying Energy West's motions for summary judgment and directed verdict regarding Tacke's status as an exempt employee*

for purposes of overtime compensation under the FLSA?

¶4 *2. Did the District Court err in awarding liquidated damages to Tacke?*

¶5 *3. Did the District Court err in awarding attorneys' fees to Tacke without requiring Tacke's counsel to provide contemporaneous time records?*

¶6 *4. Did the District Court err in awarding costs pursuant to FLSA instead of the Montana costs statute?*

¶7 *5. Did the District Court err in admitting Tacke's exhibits 2, 3, 4, and 13 over Energy West's objections?*

FACTUAL AND PROCEDURAL BACKGROUND

¶8 Tacke began work for Energy West in 1970 and held various positions within the company during her more than thirty-year career. Tacke filed suit against Energy West to recover overtime wages she claimed she had earned between September 15, 2002, and July 15, 2005.

¶9 During those years, Tacke worked as the Supervisor of the Credit and Collection Department, a position for which she received a salary and was classified by Energy West as an exempt employee. Tacke's exempt classification meant she was not entitled to receive overtime wages in addition to her salary.

¶10 In 2004, Tacke and other Energy West employees attended a wage and hour seminar in

Billings. The seminar spurred several management employees to question Tacke's classification as an exempt employee. Energy West's Human Resources Department advised Kurt Baltrusch, Director of Operations and Tacke's direct supervisor, of the potential error, and Baltrusch investigated the matter further.

¶11 Baltrusch testified that he sought advice from John Allen, who was both corporate counsel and the Human Resources Officer for Energy West. Allen instructed Baltrusch to ask Tacke to prepare a written list of her duties. Allen also provided Baltrusch a checklist to aid in determining whether Tacke should be classified as an exempt or non-exempt employee. Tacke provided a listing of her duties and the percentage of her time expended on each duty. After reviewing the list, Baltrusch testified that he again spoke with Allen and, although testimony was unclear about whether the two relied upon either the "executive" or "administrative" exemption set forth in law, both agreed that Energy West should reclassify Tacke as a non-exempt employee entitled to receive overtime compensation. Baltrusch testified he also spoke with others about the issue, including Energy West CEO David Cerotzke. Cerotzke initially disputed Baltrusch's conclusion but eventually allowed Baltrusch to reclassify Tacke as non-exempt.

¶12 On June 30, 2005, Baltrusch wrote a letter to Tacke informing her that Energy West was reclassifying her as non-exempt. The letter provided, in relevant part: "For some time there has been a question on your employment status, that is whether you are exempt or non-exempt for overtime. From my standpoint, you are a non-exempt employee and must

be paid when you work extra hours, that is, over 40 hours each week." Tacke testified that she discussed the details of the letter with Baltrusch and Allen, but that the issue of past uncompensated overtime was not resolved.

¶13 Tacke filed suit against Energy West in September 2005 in the Eighth Judicial District Court to recover claimed overtime compensation. After Tacke filed suit, Energy West reversed its decision to classify her as non-exempt, returning her to exempt status.

¶14 The District Court denied cross-motions for summary judgment, and the case proceeded to a jury trial. On November 14, 2008, the jury returned a special verdict in favor of Tacke for $35,220.00 in uncompensated overtime wages. The jury did not, however, find that Tacke proved by a preponderance of the evidence that Energy West's failure to pay overtime was willful.

¶15 The District Court entered a judgment on January 15, 2009, awarding Tacke $35,220.00 for uncompensated overtime wages, an additional $35,220.00 in liquidated damages, and $4,958.73 in costs. On July 21, 2009, the District Court awarded Tacke an additional $4,372.10 in expert witness fees, $1,147.10 for travel expenses for Attorney Howard Strause, and attorneys' fees of $95,737.50 for Strause and $90,675.00 for Elizabeth Best. Tacke obtained a total final judgment against Energy West for $267,330.43. Energy West appeals.

STANDARD OF REVIEW

¶16 We review the District Court's denial of motions for summary judgment and directed verdict *de novo*. *Tucker v. Farmers Ins. Exch.*, 2009 MT 247, ¶ 23, 351 Mont. 448, 215 P.3d 1 (citation omitted); *McKay v. Wilderness Dev., LLC*, 2009 MT 410, ¶ 26, 353 Mont. 471, 221 P.3d 1184 (citation omitted). When considering a summary judgment motion, a court may not "make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses." *Andersen v. Schenk*, 2009 MT 399, ¶ 2, 353 Mont. 424, 220 P.3d 657. The court may only "examine[] the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits to determine whether there is a genuine issue as to any material fact relating to the legal issues raised and, if there is not, whether the moving party is entitled to judgment as a matter of law on the undisputed facts." *Andersen*, ¶ 2 (citing M. R. Civ. P. 56(c); *Corporate Air v. Edwards Jet Ctr.*, 2008 MT 283, ¶ 28, 345 Mont. 336, 190 P.3d 1111). Similarly, a motion for a directed verdict is "proper only when there is a complete absence of any evidence to warrant submission to a jury." *Ryan v. City of Bozeman*, 279 Mont. 507, 510, 928 P.2d 228, 229-30 (1996) (citation omitted).

¶17 We review the District Court's award of attorneys' fees, costs, and evidentiary rulings for an abuse of discretion. *In re Marriage of Cameron*, 2009 MT 302, ¶ 17, 352 Mont. 375, 217 P.3d 78 (citation omitted); *Ritchie v. Town of Ennis*, 2004 MT 43, ¶ 8, 320 Mont. 94, 86 P.3d 11 (citation omitted); *Malcolm v. Evenflo Co.*, 2009 MT 285, ¶ 29, 352 Mont. 325, 217 P.3d 514 (citation omitted).

DISCUSSION

¶18 *1. Did the District Court err in denying Energy West's motions for summary judgment and directed verdict regarding Tacke's status as an exempt employee for purposes of overtime compensation under the FLSA?*

¶19 Energy West argues Tacke provided no facts establishing that she fell outside the administrative exemption to the FLSA and the District Court therefore erred in denying its motions for summary judgment and directed verdict. Tacke counters that she indeed presented evidence that her work did not qualify for the administrative exemption and that Energy West failed to show, as a matter of law, that she fit within the administrative exemption.

¶20 In 1938, Congress passed the FLSA "to prevent the use of unfair trade practices in interstate commerce leading to 'labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . . .'" *Stewart v. Region II Child and Family Servs.*, 242 Mont. 88, 94, 788 P.2d 913, 917 (1990) (citation omitted). The FLSA requires employers to pay employees overtime compensation for hours worked in excess of forty hours per week. 29 U.S.C. § 207(a)(1). The FLSA provides exemptions for certain executive and administrative employees, but employers bear the burden of proving that the employee fits "plainly and unmistakably within the exemption's terms." *Mont. Public Employee's Assoc. v. Mont. Dept. of Transp.*, 1998 MT 17, ¶ 11, 287 Mont. 229, 954 P.2d 21 (citing *Spradling v. City of Tulsa*, 95 F.3d 1492, 1495 (10th Cir. 1996); *Aaron v. City of*

Wichita, 54 F.3d 652, 657 (10th Cir. 1995); *Reich v. Wyo.*, 993 F.2d 739, 741 (10th Cir. 1993)).

¶21 The administrative exemption relied upon by Energy West applies if three elements exist.[1] First, the employee must be "[c]ompensated on a salary or fee basis at a rate not less than $455.00 per week . . . exclusive of board, lodging, or other facilities." 29 C.F.R. § 541.200(a)(1). Second, the employee's "primary duty" must be "the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers." 29 C.F.R. § 541.200(a)(2). "To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business . . . ." 29 C.F.R. § 541.201(a). Third, the employee's "primary duty" must include "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. § 541.200(a)(3). Such discretion or independent judgment must be "more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources." 29 C.F.R. § 541.202(e). To aid in applying these three elements, the regulations provide examples of positions that qualify for the administrative exemption. 29 C.F.R. § 541.203; *see also* 29 C.F.R. § 541.703(b).

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[1] In 2004 the U.S. Department of Labor reorganized and clarified the regulations addressing the administrative exemption, but, for purposes of the analysis in this case, the substantive content of the regulations remained the same.

¶22 Applying these regulations to the evidence in the record leads us to conclude that the District Court did not err in denying summary judgment and a directed verdict to Energy West. We need look no further than Tacke's own testimony about her typical work day. At 6:00 a.m., Tacke began by printing notices for Energy West customers whose accounts were delinquent. The computer generated the list of notices, and the printing generally took Tacke two hours to complete. Around 8:00 a.m., Tacke would help cashiers open the mail and post payments to ensure Energy West did not shut off gas to a customer who had just paid a delinquent account. From 9:00 a.m. to 10:00 a.m., Tacke returned to printing notices for delinquent accounts until completed. For the rest of the morning, Tacke took "phone calls and payments from customers" and also called customers to arrange for Energy West to access inside meters. During the lunch hour and other break periods, Tacke filled in for the switchboard operator. For the rest of the afternoon, Tacke took additional phone calls from customers who wanted to pay on their past due accounts, entered customer payments on the computer system, and ensured Energy West had access to inside meters. According to Tacke, she addressed customer issues with the Public Service Commission less than once a month. She operated exclusively within Energy West's policies and manuals, and, similar to other employees, was authorized to "write off balances that people owe on their bills" of up to only $50.

¶23 This testimony, taken as true, establishes that Tacke did not meet the requisite elements, set forth above, for an administratively exempt employee. Although contested by Energy West, this evidence was nonetheless sufficient to raise genuine issues of

material fact about whether Tacke qualified for the administrative exemption. *See Andersen*, ¶ 2 (A court has no authority to "make findings of fact, weigh the evidence, choose one disputed fact over another, or assess the credibility of witnesses" at the summary judgment stage.) Neither was there "a complete absence of any evidence to warrant submission to a jury" necessitating a directed verdict. *Ryan*, 279 Mont. at 510, 928 P.2d at 229-30 (citation omitted). We affirm the District Court's denial of Energy West's motions for summary judgment and directed verdict.

¶24 *2. Did the District Court err in awarding liquidated damages to Tacke?*

¶25 We review an award of liquidated damages under the FLSA utilizing multiple standards of review, although we have not previously stated them comprehensively. First, concerning the determination that an employer has or has not acted in good faith and on reasonable grounds, a district court's factual findings are reviewed for clear error and legal conclusions are reviewed *de novo* for correctness. *Tefft v. Mont.*, 271 Mont. 82, 91-92, 894 P.2d 317, 323 (1995); *see also Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1272 (11th Cir. 2008) (citing 29 U.S.C. § 260). Then, if an employer has established good faith and reasonable grounds, we review the ultimate decision concerning an award of liquidated damages for an abuse of discretion. *Tefft*, 271 Mont. at 93, 894 P.2d at 324; *Rodriguez*, 518 F.3d at 1272.

¶26 Energy West first argues that because the jury found it did not act willfully in withholding overtime compensation from Tacke, the District Court was prohibited from awarding liquidated damages. Tacke

responds that, while she did not satisfy her burden of proving Energy West acted willfully, Energy West likewise failed to meet its burden of proving it acted in good faith and on reasonable grounds—an entirely different question.

¶27 The FLSA provides that if an employer withholds overtime compensation in violation of 29 U.S.C. § 207(a)(1), the employer "shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . *and in an additional equal amount as liquidated damages.*" 29 U.S.C. § 216(b) (emphasis added). However they may be perceived, liquidated damages are not for the purpose of punishing the employer, but for compensating employees "for any losses caused by delayed receipt of overtime wages they are due." *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991) (citation omitted). To avoid liquidated damages, an employer must first demonstrate that his actions were "in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA] . . . ." 29 U.S.C. § 260, *see also* 29 C.F.R. § 790.22.

¶28 The employer bears a "substantial burden" in demonstrating good faith and reasonable grounds. *Renfro v. City of Emporia*, 948 F.2d 1529, 1540 (10th Cir. 1991) (citation omitted); *Marshall v. Brunner*, 668 F.2d 748, 753 (3d Cir. 1982). "Good faith" exists when the employer has "an honest intention to ascertain and follow the dictates of the Act." *Renfro*, 948 F.2d at 1540 (citation omitted). "Reasonable grounds" is an objective standard by which to evaluate the employer's behavior. *Renfro*, 948 F.2d at 1540 (citation omitted). Prior to a showing of good faith and reasonable grounds, "the

district court has *no discretion* to mitigate an employer's statutory liability for liquidated damages." *Marshall*, 668 F.2d at 753 (emphasis added, citation omitted). Only after the employer carries its burden may a district court, "in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." 29 U.S.C. § 260.

¶29 We thus reject Energy West's suggestion that, because it did not act willfully, *ipso facto* it acted in good faith and on reasonable grounds. The question of willfulness determines the length of the statute of limitations. In "a cause of action arising out of a willful violation," instead of a two-year statute of limitations, the employee is entitled to a three-year statute of limitations. 29 U.S.C. § 255(a). To gain the additional year, the burden is on the *employee* to show the employer's actions were willful, meaning "deliberate," "intentional," or that "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133, 135, 108 S. Ct. 1677, 1681, 1682 (1988). Here, the jury determined this standard had not been met, and Tacke was therefore entitled to the two-year statutory period. This determination, however, is an entirely different question than whether the employer acted in good faith and upon reasonable grounds. *See Rodriguez*, 518 F.3d at 1274. The *employer* bears the burden of demonstrating the good faith and reasonable grounds necessary to avoid an award of liquidated damages, and it is noteworthy that, in addition to being described as a "substantial burden," courts have stated that an employer's ability to escape liquidated damages is the exception, not the rule. *Walton v. United Consumers Club, Inc.*, 786 F.2d

303, 310 (7th Cir. 1986) (recognizing "[d]ouble damages are the norm, single damages the exception").[2]

¶30 Even if the employer carries this burden, the district court "may still award liquidated damages at its discretion in any amount up to that allowed by 29 U.S.C. § 216(b)." *Mireles v. Frio Foods, Inc.*, 899 F.2d 1407, 1416 n. 8 (5th Cir. 1990) (citing *McClanahan v. Mathews*, 440 F.2d 320, 323 (6th Cir. 1971); *Martinez v. Food City, Inc.*, 658 F.2d 369, 376 (5th Cir. Unit A 1981)). "[I]f the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds . . . , the court *may, in its sound discretion*, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title." 29 U.S.C. § 260 (emphasis added). Because Congress used the permissive word "may" instead of "shall," the District Court had no affirmative obligation to strike or reduce the liquidated damages award against Energy West. In light of the facts in this record, we conclude that the District Court was well within its discretion to decline to do so.

¶31 *3. Did the District Court err in awarding attorneys' fees to Tacke without requiring Tacke's counsel to provide contemporaneous time records?*[3]

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[2] The parties here agreed that whether Energy West acted in good faith and on reasonable grounds was a determination to be made by the court, not the jury.

[3] Energy West does not challenge the District Court's conclusion that a fee rate of $225 per hour was reasonable or its calculation of the lodestar amount.

¶32 FLSA provides that "[t]he court in such action shall . . . allow a reasonable attorney's fee to be paid by the [employer] . . . ." 29 U.S.C. § 216(b). To determine the attorneys' fees, courts use the "lodestar" method, which consists of "[m]ultiplying the number of hours reasonably spent on the case by an appropriate hourly rate in the community for such work." *Saizan v. Delta Concrete Prods. Co.*, 448 F.3d 795, 799 (5th Cir. 2006) (per curiam) (citation omitted); *see also Laudert v. Richland Co. Sheriff's Dept.*, 2001 MT 287, ¶ 14, 307 Mont. 403, 38 P.3d 790. The lodestar method "is *presumed* to be the reasonable fee to which counsel is entitled." *Penn. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546, 564, 106 S. Ct. 3088, 3098 (1986) (quoting *Blum v. Stenson*, 465 U.S. 886, 897, 104 S. Ct. 1541, 1548 (1984)) (emphasis in original, quotations omitted); *Laudert*, ¶ 17 (citation omitted). The party seeking the fees bears the burden of showing the "reasonableness of the hours billed." *Saizan*, 448 F.3d at 799. Reasonable fees do not include fees that were "unproductive, excessive, or redundant," and the fee claimant must establish reasonableness by the presentation of evidence. *Saizan*, 448 F.3d at 799 (citation omitted).

¶33 Energy West argues the District Court erred in awarding attorneys' fees because Tacke failed to submit contemporaneous time records detailing her counsel's work on the matter. Tacke rebuts Energy West's argument, first, by arguing Energy West neither requested the production of billing documentation nor produced its own number of hours worked on the case. However, it was not Energy West which was seeking a fee award. It was Tacke's burden, not Energy West's, to provide evidence demonstrating that her claimed attorneys' fees were reasonable. To

hold otherwise would shift Tacke's burden to Energy West.

¶34 Tacke then argues, as she did in the District Court, that she was not required to provide contemporaneous billing records and that her evidence was sufficient to carry her burden. The evidence Tacke submitted to the District Court consisted of two affidavits containing a total of seven sentences, expert deposition testimony, and testimony from Tacke's counsel. This evidence was long on opinion, but short on detail about the purpose of the hours claimed by the lawyers. The District Court concluded that the evidence, when coupled with its personal knowledge of the case, validated "the hours that have been submitted here are in fact reasonable."

¶35 However, unlike a district court, an appellate court lacks personal observation and involvement in a case that can be called upon when considering an attorneys' fees award. Without detailed evidence about the hours spent, we are left to assessing counsel's conclusory statements about lack of duplication or reasonableness on their face, or comparing contrary expert opinion. Appropriate appellate review is thereby hindered, and for this reason appellate courts nationally have required production of contemporaneous billing records, speaking with much frustration about the issue. The Second Circuit admonished plaintiffs' counsel in a similar, fee-shifting circumstance:

> In light of the difficulties that can be traced to the failure of plaintiffs' attorneys to keep contemporaneous time records, we are tempted

> to accept the State's proposal that plaintiffs be denied all attorney's fees.
>
> . . .
>
> [T]he difficulties raised by the lack of contemporaneous records in this case convince us of the need to announce for the future that contemporaneous time records are a prerequisite for attorney's fees in this Circuit.

N.Y. State Assoc. for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1147 (2d Cir. 1983) (analyzing award of reasonable attorneys' fees under 42 U.S.C. § 1988). We are similarly "tempted" in this case. Other courts have likewise expressed these concerns. *See e.g. Natl. Assoc. of Concerned Vets. v. Sec. of Def.*, 675 F.2d 1319, 1327 (D.C. Cir. 1982); *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984); *In re Hudson & Manhattan R.R.*, 339 F.2d 114, 115 (2d Cir. 1964); *Sussman v. Patterson*, 108 F.3d 1206, 1212 (10th Cir. 1997); *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983) ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Erickson v. City of Topeka*, 239 F. Supp. 2d 1202, 1206 (D. Kan. 2002) ("To satisfy the burden of proving a reasonable fee, counsel must keep contemporaneous and detailed records of time . . . .") (citation omitted); *Bergeson v. Dilworth*, 875 F. Supp. 733, 737 (D. Kan. 1995) (production of time records required when attorneys work on a contingent fee basis).

¶36 Tacke further argues that even if she wanted to produce the billing records, both the attorney-client privilege and work-product doctrine preclude her from doing so. In asserting the attorney-client privilege, Tacke cites to *Clarke v. American Commerce Natl.*

Bank, 974 F.2d 127 (9th Cir. 1992). However, assuming *Clarke* applies, it does not support a blanket prohibition on providing billing records. There, the American Commerce National Bank (ACNB) allegedly paid the personal legal expenses for its chairman. *Clarke*, 974 F.2d at 128. The Office of the Comptroller of the Currency investigated the matter further, and eventually issued an administrative subpoena to ACNB for the production of billing statements from outside legal counsel. *Clarke*, 974 F.2d at 128. ACNB asserted the attorney-client privilege, and after reviewing the records, the Ninth Circuit concluded:

> [The billing statements] do not contain privileged communications between attorney and client. The statements contain information on the identity of the client, the case name for which payment was made, the amount of the fee, and the general nature of the services performed.

Clarke, 974 F.2d at 130. While *Clarke* protects records "which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided," it does not support a blanket prohibition on the use of billing statements. *Clarke*, 974 F.2d at 129. In-camera review by the district courts, accompanied with the use of redaction when necessary, will accommodate the need for such records in order to demonstrate the reasonableness of fee awards in fee-shifting cases while also protecting the attorney-client privilege. *See e.g. Huether v. Dist. Ct. of the Sixteenth Jud. Dist.*, 2000 MT 158, ¶ 22, 300 Mont. 212, 4 P.3d 1193.

¶37 Equally unpersuasive is Tacke's argument that the work-product doctrine also prohibits the use of billing statements to support an attorneys' fees claim. The work-product doctrine, as delineated in M. R. Civ. P. 26(b)(3), "is broader in application than the attorney-client privilege, but it is not an absolute privilege." *Kuiper v. Dist. Ct. of the Eighth Jud. Dist.*, 193 Mont. 452, 462, 632 P.2d 694, 700 (1981). To interpret the doctrine as imposing a blanket prohibition on the use of administrative records, such as time and billing documents, stretches the privilege too far. As generally noted, "the work product rule cannot be invoked by an attorney in connection with an affirmative claim for recovery of attorney's fees to avoid a discovery inquiry concerning possible apportionment of fees among compensable and noncompensable claims." 23 Am. Jur. 2d *Depositions and Discovery* § 45 (2002) (citing *Martin v. Paunovich*, 632 So. 2d 611 (Fla. 5th Dist. App. 1993)); *see also First Union Natl. Bank of S.C. v. Soden*, 511 S.E.2d 372, 380 (S.C. App. 1998) (analyzing billing statement as not falling within work product). To the extent billing records may contain "ordinary work product" or "opinion work product," the records are, again, subject to redaction of such information. *See e.g. Palmer by Diacon v. Farmers Ins. Exch.*, 261 Mont. 91, 115, 118, 861 P.2d 895, 910, 912 (1993).

¶38 The District Court conducted a careful review of the fee issue and we conclude that it exercised conscientious judgment and did not clearly err in evaluating the evidence or abuse its discretion in approving the fee award. However, while we do not adopt a per se rule as some courts have done, we strongly urge counsel to keep and provide contemporaneous time records in support of attorneys'

fees requests in fee-shifting cases, and we encourage district courts to look askance at requests not so supported.

¶39 *4. Did the District Court err in awarding costs pursuant to FLSA instead of the Montana costs statute?*

¶40 Energy West argues the District Court erred by awarding costs beyond those allowed under § 25-10-201, MCA, which it argues is controlling. Tacke responds that costs in this case should be awarded pursuant to 29 U.S.C. § 216(b), not § 25-10-201, MCA.

¶41 Tacke brought this case under FLSA, which provides that "[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b). Montana's cost statute allows the following costs:

> (1) the legal fees of witnesses, including mileage, or referees and other officers;
> (2) the expenses of taking depositions;
> (3) the legal fees for publication when publication is directed;
> (4) the legal fees paid for filing and recording papers and certified copies of papers necessarily used in the action or on the trial;
> (5) the legal fees paid stenographers for per diem or for copies;
> (6) the reasonable expenses of printing papers for a hearing when required by a rule of court;
> (7) the reasonable expenses of making transcript for the supreme court;

> (8) the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and
> (9) other reasonable and necessary expenses that are taxable according to the course and practice of the court or by express provision of law.

Section 25-10-201, MCA. Energy West challenges the District Court's award of costs for mediation fees, legal research, copies, postage, and the construction and synchronization of a deposition, arguing they exceed the costs allowed by § 25-10-201, MCA.

¶42 When determining which statute to apply, we are to use the particular over the general. Section 1-3-225, MCA. Our decision in *Kuhr v. City of Billings*, 2007 MT 201, 338 Mont. 402, 168 P.3d 615, provides helpful guidance. In *Kuhr*, the employees pursued a wage claim under the state statutory scheme. *Kuhr*, ¶ 8. The parties argued whether costs should be awarded under the general costs statute or pursuant to § 39-3-214, MCA, of the wage claim statutes. *Kuhr*, ¶ 35. We reasoned that "a more specialized statute" may require its application instead of the general costs statute. *Kuhr*, ¶ 37. We concluded that "[t]his is a wage claim case specifically covered by a more specialized statute," and applied § 39-3-214, MCA, the statute awarding costs in wage claims, instead of the general costs statute, § 25-10-201, MCA. *Kuhr*, ¶ 37.

¶43 Similar to *Kuhr*, FLSA's cost provision is more specific and should control over Montana's general costs statute. To effectuate FLSA's policies, "Congress has permitted individual employees to sue for back wages and liquidated damages and to receive

reasonable attorney's fees and costs." *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 740 n. 16, 101 S. Ct. 1437, 1444 n. 16 (citing 29 U.S.C. § 216(b)). In keeping with the purpose of FLSA and our logic in *Kuhr*, 29 U.S.C. § 216(b) should govern instead of § 25-10-201, MCA.[4]

¶44 *5. Did the District Court err in admitting Tacke's exhibits 2, 3, 4, and 13 over Energy West's objections?*

¶45 Energy West argues that Tacke's exhibits of 2, 3, 4, and 13 were irrelevant, confusing, and should have been excluded. Tacke responds that these exhibits were relevant because they allowed the jury to compare her classification and duties when classified as non-exempt with her duties when classified as exempt. Tacke further argues that Energy West did not raise the proper objection for exhibits 2 and 4.

¶46 Relevant evidence includes "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." M. R. Evid. 401. The exhibits at issue are

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[4] Our holding is limited by Energy West's narrow argument that the District Court erred in awarding costs beyond those allowed under § 25-10-201, MCA. While we reject application of § 25-10-201, MCA, to the case *sub judice*, no argument is made that the costs awarded here were not allowable under 29 U.S.C. § 216(b). There is authority on that issue, but we leave the issue for another day. *See e.g. Cho v. Koam Med. Servs. P.C.*, 524 F. Supp. 2d 202, 212 (E.D.N.Y. 2007) (denying legal research costs); *Williams v. R.W. Cannon, Inc.*, 657 F. Supp. 2d 1302, 1316 (S.D. Fla. 2009) (denying mediation expenses); *Calderon v. Witvoet*, 112 F.3d 275, 276 (7th Cir. 1997) (per curiam) (referring to 28 U.S.C. § 1920 to determine costs).

three job descriptions which were not generated during the 2002 to 2005 time period at issue, and a letter dated October 29, 1990, informing Tacke that she was classified as non-exempt and must report her overtime.

¶47 After reviewing the record, we believe Energy West properly raised a relevance objection, but conclude the District Court did not abuse its discretion in admitting the exhibits. While we see Energy West's concern about relevance, the admitted exhibits, though covering a different time period when Tacke was paid as an hourly employee, provided the jury with additional information about Energy West's classification and reclassification of Tacke's position and whether Energy West had acted willfully.

¶48 Even if relevant, evidence may be excluded if it has the propensity to confuse the issue or mislead the jury. M. R. Evid. 403. Here, the District Court required Tacke to lay additional foundation about the exhibits and Energy West had the opportunity through cross-examination, case-in-chief, and closing arguments to clarify any potential confusion that the exhibits caused.

¶49 Affirmed.

/S/ JIM RICE

We concur:

/S/ W. WILLIAM LEAPHART
/S/ BRIAN MORRIS
/S/ PATRICIA O. COTTER
/S/ JAMES C. NELSON

APPENDIX B

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

Cause No. BDV-05-1064

[Dated July 21, 2009]

DELORES TACKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ENERGY WEST, INC.,	)
	)
Defendant.	)
	)

ORDER RE: ATTORNEY FEES AND COSTS

On July 21, 2009, a hearing was held on Plaintiffs Motion for Attorney Fees and Costs. Plaintiff was represented by Elizabeth Best and Howard Strause. Defendant was represented by Mark Higgins and Richard Selby. The Court considered the testimony, evidence, and arguments presented and issued findings of fact, conclusions of law, and an order in open court which are incorporated herein as if set forth fully.

THEREFORE, IT IS HEREBY ORDERED:

1. That Plaintiff is entitled to recover the following costs from Defendant:

   $4372.10 Expert witness fee of Peter Meloy;
   $1147.10 Travel expenses for Howard Strause.

2. That Plaintiff is entitled to recover the following attorney fees from Defendant:

Elizabeth Best 425.5 hours at $225.00 per hour =	$95,737.50
Howard Strause 403 hours at $225.00 per hour =	$90,675.00
	$186,412.50

DATED this 21st day of July, 2009.

/s/Julie Macek
JULIE MACEK
DISTRICT COURT JUDGE

cc: Howard Strause, Esq.
1917 West Hill Place
Great Falls MT 59404

Elizabeth Best, Esq.
PO Box 2114
Great Falls MT 55403

Attorneys for Plaintiff

Mark Higgins, Esq.
PO Box 1746
Great Falls MT 59403

Richard Selby, II, Esq. (#0059996)
Dworken & Bernstein Co., L.P.A.
60 South Park Place
Painseville, OH 44077

Attorneys for Defendant

APPENDIX C

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

Cause No. BDV-05-1064

[Dated January 14, 2009]

DELORES TACKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ENERGY WEST, INC.,	)
	)
Defendant.	)
	)

SECOND AMENDED PARTIAL JUDGMENT

This case having come for trial with jury on November 10, 2008, and after consideration of the testimony presented and evidence introduced, the jury did, on November 14, 2008, return a Special Verdict in favor of Plaintiff, Delores Tacke, awarding Plaintiff the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00) in damages against Energy West, Incorporated.

The Court held a hearing on January 12, 2009. Plaintiff was represented by Howard Strause and

Elizabeth Best. Defendant was represented by Richard Selby and Mark Higgins. The Court considered the testimony and evidence presented at trial, arguments of counsel, briefs and other papers filed by the parties on the subject of liquidated damages and costs.

A copy of said Special Verdict is attached hereto and by this reference made a part hereof;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff Delores Tacke in the above-entitled action shall have judgment against Defendant, Energy West, in the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00);

2. That the Plaintiff be awarded liquidated damages in the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00); and

3. That the Plaintiff be awarded reasonable costs of this lawsuit in the sum Four Thousand, Nine Hundred Fifty Eight and Seventy Three Cents ($4,958.73).

4. That the Plaintiff be further awarded her reasonable attorney fees and costs, the amount to be determined at a later date.

DATED this 14th day of January, 2009.

JULIE MACEK
THE HONORABLE JULIE MACEK

cc: Richard N. Selby, II., Esq.
Mark Higgins, Esq.
Elizabeth A. Best, Esq.
Howard F. Strause, Esq.

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

Cause No. BDV-05-1064

[Filed November 14, 2008]

DELORES TACKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ENERGY WEST, INC.,	)
	)
Defendants.	)
	)

SPECIAL VERDICT FORM

1. Did Delores Tacke prove by a preponderance of the evidence that Energy West failed to pay her overtime wages?

   X yes
   ____ no

   A) If **no**, go no further and inform the bailiff you have reached a verdict.
   B) If **yes**, proceed to question #2.

2. Did Energy West prove by a preponderance of the evidence that Delores Tacke was exempt from payment of overtime due to the administrative exemption?

____ yes
X no

A) If **yes**, go no further and inform the bailiff you have reached a verdict.
B) If **no**, proceed to question #3.

3. Did Delores Tacke prove by a preponderance of the evidence that Energy West's failure to pay overtime was willful?

____ yes
X no

A) If **yes**, proceed to #4.
B) If **no**, skip question #4 and proceed to question #5.

4. If you found Energy West acted willfully, what is the amount of unpaid wages owed to Delores Tacke for the period from September 15, 2002 to July 15, 2005?

$_____

If you have answered question #4, go no further and inform the bailiff you have reached a verdict.

5. If you found Energy West did not act willfully, what is the amount of unpaid wages owed to Delores Tacke for the period from September 15, 2003 to July 15, 2005?

$35,220.00

Please sign the verdict form and return it to the bailiff.

/s/ _____
Jury Foreperson

Dated this 14 day of November, 2008.

APPENDIX D

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

Cause No. BDV-05-1064
MF64FR9385

[Filed December 4, 2008]

DELORES TACKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ENERGY WEST, INC.,	)
	)
Defendant.	)
	)

AMENDED PARTIAL JUDGMENT

This case having come for trial with jury on November 10, 2008, and after consideration of the testimony presented and evidence introduced, the jury did, on November 14, 2008, return a Special Verdict in favor of Plaintiff, Delores Tacke, awarding Plaintiff the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00) in damages against Energy West, Incorporated..

A copy of said Special Verdict is attached hereto and by this reference made a part hereof;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff Delores Tacke in the above-entitled action shall have judgment against Defendants, Energy West, in the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00);

2. That the Plaintiff be further awarded her reasonable attorney fees and costs; and

3. That the Plaintiff be awarded liquidated damages to be determined by the Court after a hearing to be held on Monday, January 12, 2009 at the hour of 9:00 o'clock a.m.

DATED this 4th day of December, 2008.

/s/JULIE MACEK
THE HONORABLE JULIE MACEK

cc: Richard N. Selby, II., Esq.
Mark Higgins, Esq.
Elizabeth A. Best, Esq.
Howard F. Strause, Esq.

***

Special Verdict Form
[formatted in this appendix at pages 29a-31a]

APPENDIX E

MONTANA EIGHTH JUDICIAL DISTRICT COURT, CASCADE COUNTY

Cause No. BDV-05-1064
MF64FR9385

[Filed November 25, 2008]

DELORES TACKE,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ENERGY WEST, INC.,	)
	)
Defendant.	)
	)

JUDGMENT

This case having come for trial with jury on November 10, 2008, and after consideration of the testimony presented and evidence introduced, the jury did, on November 14, 2008, return a Special Verdict in favor of Plaintiff, Delores Tacke, awarding Plaintiff the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00) in damages against Energy West, Incorporated.

A copy of said Special Verdict is attached hereto and by this reference made a part hereof;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That Plaintiff Delores Tacke in the above-entitled action shall have judgment against Defendants, Energy West, in the sum of Thirty Five Thousand, Two Hundred Twenty Dollars ($35,220.00); and

2. That the Plaintiff be further awarded her reasonable attorney fees and costs.

DATED this 25th day of November, 2008.

/s/JULIE MACEK
THE HONORABLE JULIE MACEK

cc: Richard N. Selby, II., Esq.
Mark Higgins, Esq.

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Special Verdict Form
[formatted in this appendix at pages 29a-31a]

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(2)

Supreme Court, U.S.
FILED
AUG 0 2 2010
OFFICE OF THE CLERK

No. 09-1437

In the Supreme Court of the United States

ENERGY WEST, INC.,

Petitioner,

v.

DELORES TACKE,

Respondent.

On Petition for Writ of Certiorari to the Montana Supreme Court

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Montana Supreme Court correctly applied the abuse of discretion test to determine if the District Court erred in awarding attorneys' fees and correctly concluded the District Court conscientiously examined the evidence and did not abuse its discretion?

2. Whether the Montana Supreme Court correctly enunciated a rule for the production of contemporaneous billing records in fee-shifting cases that is for all practical purposes identical to the rule adopted by federal courts examining the issue?

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REASONS FOR DENYING THE WRIT

1. Statement of Facts and Issues

The District Court exercised conscientious judgment and discretion in evaluating the evidence before approving the attorneys' fee award to the Respondent. In reviewing that decision, the Montana Supreme Court determined the District Court did not abuse its discretion in approving the fee award. Furthermore, the Montana Supreme Court adopted a rule regarding the production of time records to determine the amount of reasonable attorney's fees. For all practical purposes, this rule is identical to the rule urged upon this Court by Petitioner in its Petition for Writ of Certiorari.

Before awarding attorneys' fees, the District Court conducted a thorough hearing. Petitioner agrees the District Court correctly used the lodestar method for calculating Respondent's attorneys' fees. In applying the lodestar method, the District Court stated it had read everything that was submitted to the Court. This included affidavits submitted by attorneys, depositions of attorneys well-versed in labor law, and importantly, a thorough review of the entire file. (Resp. App. 23b-24b). Respondent's attorneys were sworn and testified as to the number of hours reasonably expended, down to the tenth of an hour, based upon their contemporaneous billing records.

The District Court recognized it had to determine the number of hours reasonably expended. The District Court emphasized that in order to accomplish this task, it "went through the court file in detail and ferreted out the services that were rendered here on

behalf of the Plaintiff's Counsel." (Resp. App. 24b). The extent of the conscientious effort by the District Court is evidenced by its recitation of the work expended by Respondent's counsel, to-wit:

> Obviously, they began by researching and formulating and drafting a Complaint. And then, formulated and prepared extensive discovery requests; prepared several affidavits in this matter. There were motions that were researched, formulated, and drafted including summary judgment motions that went to hearing and motions in limine; multiple motions in limine, that were put together. They were obviously researching, formulating, and preparing responses to all of the Defendant's briefs, which there were several in this case and Defendant's motions in limine. There was a trial brief that was researched and drafted; a pretrial order. There was also jury instructions; and consultation with experts preparing for and presenting at the pretrial hearings in this case and post-trial hearings, which included liquidated damages hearing; and this hearing as well. In addition, there was trial preparation and - - preparation. There was a jury trial that was four days long and the time involved in conducting that jury trial. And the time for today's hearing and the post-trial proceedings that we've had as well.
>
> In regards to the type of case this involved and the time and trouble involved, obviously this case was hotly contested by Energy West.

> There was a great deal of trial preparation put into this case.

(Resp. App. 24b-25b).

The District Court characterized the work of Respondent's counsel as "above average", "substantial", "time consuming" and "necessary". The District Court further stated there was no evidence that the attorneys failed to use their time wisely. (Resp. App. 25b). In determining the appropriateness of the number of hours expended by Respondent's attorneys, the District Court noted she was familiar with the attorneys and the type of law they practiced. The District Court stated these attorneys "are probably some of the most skilled counsel that the Plaintiff could have hired to represent her in this claim." (Resp. App. 27b-28b). The District Court further stated there was no evidence the attorneys had duplicated their time or any reason to believe that the time claimed by them was not correct. (Resp. App. 28b).

The District Court Judge handled this case from start to finish. She was therefore, personally familiar with the case and the work performed by the attorneys. The District Court noted she sat through all pretrial matters and the trial itself. Based upon the foregoing, she concluded she had sufficient evidence to determine the requested hours were reasonable. (Resp. App. 29b).

The District Court Judge exercised her independent judgment in determining the rate of hourly attorneys' fees. The District Court reduced the hourly rate claimed by Respondent's attorneys. Respondent

requested attorneys' fees in the amount of $250 per hour. Petitioner argued for the hourly rate of $200 to $220. The District Court granted attorneys' fees in the amount of $225 per hour.

The Montana Supreme Court reviewed this issue and unanimously concluded, "The District Court conducted a careful review of the fee issue and we conclude that it exercised conscientious judgment and did not clearly err in evaluating the evidence or abuse its discretion in approving the fee award." (Pet. App. 18a). After a careful review of the case law requiring the necessity of providing contemporaneous billing records, the Montana Supreme Court stated, "... we strongly urge counsel to keep and provide contemporaneous time records in support of attorneys' fees requests in fee-shifting cases, and we encourage district courts to look askance at requests not so supported." (Pet. App. 18a-19a).

Respondent has requested attorneys' fees for the appeal to the Montana Supreme Court. In support of that request, Respondent has submitted to the District Court and counsel, contemporaneous billing records in compliance with this Montana Supreme Court Opinion.

2. **The Petition Identifies No Conflict in the Lower Courts That Is Appropriate for Review.**

   A. The Montana Supreme Court correctly applied the abuse of discretion test to determine if the District Court erred in awarding attorneys' fees and correctly concluded the District Court conscientiously

examined the evidence and did not abuse its discretion.

The FLSA provides that "[t]he court in such action . . . shall allow a reasonable attorney's fee to be paid by the [employer] . . . ." 29 U.S.C. §216(b). In interpreting this section, appellate courts have stated that "district courts have broad discretion in making attorney's fee awards." *Vocca v. Playboy Hotel of Chicago, Inc.*, 686 F.2d 605, ___ (7th Cir. 1982); *see also, Perdue v. Kenny A.*, ___ U.S. ___, ___, 130 S.Ct. 1662, ___, 176 L.Ed.2d 494 (2010). The role of the appeal court is to determine whether the district court abused its discretion in awarding attorney's fees. *Budanio v. Saipan Marine Tours, Inc.*, 22 Fed.Appx. 708, 711, 2001 WL 1173242 (9th Cir. 2001); *Int'l Bhd. of Carpenters and Joiners of Am. v. G.E. Chen Constr., Inc.*, 136 Fed.Appx. 36, 39, 2005 WL 1253908 (9th Cir. 2005); *Hutka v. Sisters of Providence in Washington*, 102 P.3d 947, 952 (Alaska 2004). A trial court's award of attorney's fees "must be upheld unless a clear abuse of discretion is found." *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1097 (5th Cir. 1981).

Abuse of discretion has been defined as, "an arbitrary, capricious, whimsical, or manifestly unreasonable judgment." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1135 (10th Cir. 2010) citing *Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1331 (10th Cir. 1996). As this Court has stated, appellate courts must "give the trial court the deference that is the hallmark of abuse-of-discretion review." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 137, 118 S.Ct. 512, 515 (1997).

The Montana Supreme Court correctly applied the abuse of discretion rule. It gave the District Court the deference to which it is entitled. It found that the District Court did not abuse its discretion in awarding attorneys' fees. The Montana Supreme Court noted, "The District Court conducted a careful review of the fee issue and we conclude that it exercised conscientious judgment and did not clearly err in evaluating the evidence or abuse its discretion in approving the fee award." *Tacke v. Energy West, Inc.*, 355 Mont. 243, 254, 227 P.2d 601, 610 (2010).

While acknowledging the District Court did not have the benefit of contemporaneous billing records, the Montana Supreme Court ruled that in this particular case, the District Court had sufficient other evidence to make an appropriate attorneys' fees determination. A review of the transcript of the attorneys' fee hearing amply supports this ruling. (Resp. App. 1b).

The District Court Judge conscientiously carried out her duty. First, she was the only judge throughout the entire case. She presided over all aspects of the case, from the filing of the original Complaint, through the trial, and finally made a determination as to liquidated damages. During this process, the District Judge dealt with a motion to dismiss, motions for summary judgment, motions in limine, discovery disputes, trial briefs, disagreements over jury instructions and the amount of liquidated damages. The District Court Judge emphasized that this was case "hotly contested by Energy West." (Resp. App. 25b).

The District Court Judge was familiar with Respondent's counsel and characterized their work as "above average", "substantial", "time consuming" and "necessary". (Resp. App. 25b). Knowing Respondent's counsel, the District Court Judge determined there was no reason to believe that the affidavits of counsel and their testimony regarding the amount of time expended was inaccurate. Two (2) experts, attorneys well versed in labor law, were deposed and stated the amount of time claimed was not excessive and there was no reason to disbelieve the claimed time.

Not only did the District Court exercise sound discretion in determining the reasonable number of hours expended, it did the same in determining the reasonable hourly rate to be awarded. Respondent's attorneys' requested they be paid at the hourly rate of $250. Petitioner argued the hourly rate should be somewhere between $200 and $220. The District Court ended up awarding the hourly rate of $225.

Finally, Petitioner presented no evidence that the District Court Judge abused her discretion. Respondent argued she had met her burden regarding the reasonableness of the hours claimed and the hourly rate. Both Respondent and the District Court Judge invited the Petitioner to present evidence to the contrary, such as the number of hours Petitioner's attorneys expended or their hourly rates. Petitioner declined to present such evidence. Petitioner even failed to formally request Respondent's contemporaneous billing records.

For the reasons set forth above, the Montana Supreme Court correctly determined the District Court did not abuse its discretion in applying the lodestar

factors and therefore, this Court should deny the Petition for Writ.

B. The Montana Supreme Court correctly enunciated a rule for the production of contemporaneous billing records in fee-shifting cases that is for all practical purposes identical to the rule adopted by federal courts examining the issue.

Prior to reviewing this case, the Montana Supreme Court had never addressed the issue of whether, in fee-shifting cases, the moving party was obligated to present the Court with contemporaneous billing records. As a result, the Respondent did not produce contemporaneous billing records, although they had been kept. The Respondent argued such records were privileged under the work product and attorney-client rule.

The Montana Supreme Court rejected the privilege argument but, as set forth above, ruled that the District Court Judge had ample evidence to apply the lodestar method and did not abuse her discretion in awarding attorneys' fees. Importantly, the Montana Supreme Court then set forth a rule for all future cases regarding the keeping and production of contemporaneous billing records.

The rule adopted by the Montana Supreme Court is essentially the same as the rule urged upon this Court by Petitioner in its Petition for Writ. The Montana Supreme Court stated, "... we strongly urge counsel to keep and provide contemporaneous time records in support of attorneys' fees requests in fee-shifting cases, and we encourage district courts to look

askance at requests not so supported." (Pet. App. 18a-19a).

For all practicable purposes the rule enunciated by the Montana Supreme Court is the same as the rule adopted by the First Circuit. Even Petitioner cites this Court to the case of *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984), wherein the court stated, "... the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance."

Other cases cited by the Petitioner dealt not so much with this rule, as with the nature of the contemporaneous time records. *See, Sussman v. Patterson*, 108 F.3d 1206 (10th Cir. 1997); *National Ass'n of Concerned Veterans v. Sec'y of Def.*, 675 F.2d 1319 (D.C. Cir. 1982); *Norman v. Hous. Auth.*, 836 F.2d 1292 (11th Cir. 1988).

As a result of the Montana Supreme Court opinion, Montana attorneys are now required to submit contemporaneous billing records in fee-shifting cases, if they expect to be fully compensated for their work. In this case, Respondent has requested attorneys' fees for Petitioner's appeal to the Montana Supreme Court. In support of that request, Respondent has submitted contemporaneous billing records to the District Court and counsel.

CONCLUSION

In conclusion, Petitioner has failed to present any compelling reason why this Court should grant its Petition. Petitioner has failed to cite a U.S. Supreme

Court opinion that was not followed by the Montana Supreme Court. Petitioner has not shown a split of authority in circuit or state courts requiring intervention. Petitioner has not shown how the rule adopted by the Montana Supreme Court is significantly different than that adopted by other courts. Finally, Petition has failed to show that the District Court abused its discretion in awarding attorneys' fees, requiring this Court to intervene.

Respectfully Submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF MONTANA

DELORES TACKE,	)
	)
Plaintiff/Appellee	)
	)
-VS-	)
	)
ENERGY WEST, INC.,	)
	)
Defendant/Appellant	)
	)

TRANSCRIPT ON APPEAL
PLAINTIFF'S MOTION FOR
ATTORNEY FEES HEARING

APPEAL FROM

THE DISTRICT COURT OF THE EIGHTH
JUDICIAL DISTRICT IN AND FOR
THE COUNTY OF CASCADE

THE HONORABLE JULIE MACEK PRESIDING

Transcript Prepared By: Sandra M. Francetich
Official Court Reporter

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MONTANA EIGHTH JUDICIAL DISTRICT,
CASCADE COUNTY

CAUSE NO. BDV-05-1064
BEFORE THE
HONORABLE JULIE MACEK

DELORES TACKE,	)
	)
Plaintiff,	)
	)
-VS-	)
	)
ENERGY WEST, INC.,	)
	)
Defendant	)
	)

PLAINTIFF'S MOTION FOR ATTORNEY FEES HEARING

Cascade County Courthouse
Great Falls, Montana

JULY 21, 2009

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THE COURT: You may be seated, thank you. All right, good morning. This is the time that's been set In the Matter of Tacke versus Energy West in BDV-05-1064 in regards to the issue of attorney fees. And I have received all of your briefing, have read it as well as your case citations. However, I'll allow anyone to make whatever oral arguments you would like to do so today.

And Ms. Best, since this is your motion, I'll let you begin here.

MS. BEST: Thank you, Your Honor.

I'm going to try to be brief because I know you have read all of this and read the Affidavit. The only thing I would like to -- not the only thing, the one thing I would like to do is swear myself and Howard in to testify to the truthfulness of the Affidavits we've submitted. And also tell the Court about what we've incurred since that time. So, if you don't mind, I'll just be sworn as well as Howard.

THE COURT: All right, that would be fine.

(Whereupon, the witnesses were sworn.)

MS. BEST: And Your Honor, is it okay if we testify from here?

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THE COURT: You're fine, thank you.

MS. BEST: Thank you. I just want the Court to know that the Affidavit that I submitted is true and accurate and states fully the time that I expended and the costs incurred up until the time of that Affidavit. Since that time, I have incurred an additional 19.5 hours of time at $250 an hour, which by my math, works out to $4,875 plus the time required for this hearing and preparation for this hearing, which I anticipate will be one hour plus the time expended at this hearing at $250 per hour.

And then, I'd like to submit, as an exhibit, the bill from our expert Mike Molloy for $4,372.10 for his expert testimony. And ask that that be made a part of the record. And we can just call that Exhibit A to this hearing.

THE COURT: "A"?

MS. BEST: Yes, thank you.

THE COURT: All right, that motion will be granted.

(Whereupon, Plaintiff's Exhibit A was admitted.)

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DIRECT EXAMINATION

BY MS. BEST:

Q. Howard, would you like to -- let me just ask you this: Is the Affidavit that you submitted true and accurate?

A. Yes, it is.

Q. And can you tell the Court how much time you've expended since that time, approximately?

A. About five hours is all.

Q. And do you have any other costs that you've incurred since the time of that Affidavit?

A. None that are not mentioned in my previous Affidavit.

Q. Thank you.

MS. BEST: It's possible, Your Honor, depending on what other issues come up that Mr. Strause may need to testify again.

What the Court has in its file in addition to the briefing and Affidavit that the Court has already reviewed are the -- is the testimony in videotaped form and also in transcript form of Mike Molloy, who was the Plaintiff's lawyer, employment expert, who's done a significant number of plaintiff's cases in wage an hour matters. For the Court's consideration,

he testified that he reviewed the entire file; he also talked to

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counsel, and he's familiar with the rates charged by lawyers who do the kind of work that Mr. Strause and I do, not generically, the lawyers who practice in Great Falls, but the plaintiff's lawyer who do the kind of work we do on the contingent fee bases.

He testified that $250 an hour is reasonable. Mr. Robinson, who is the expert, who was hired by Energy West, testified that he does not dispute that the number of hours that we have expended is reasonable. Mr. Molloy, of course, also testified that the number of hours is reasonable. So, the only issue before the Court, Your Honor, is whether or not the rate that we are claiming is reasonable.

I know the Court is familiar with these factors, but I wanted to make sure that the focus is where it belongs. Mr. Molloy testified that the novelty and difficulty of the legal and factual issues involved justified the rate, as did the time and labor required to perform the services, as did the character and importance of the litigation, the result secured by Mr. Strause and me, the experience, skill, and reputation of both Mr. Strause and me, and the fees customarily charged for similar legal services of the time and place were the services were rendered, as well as the ability that the clients pay for the services and

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the risk of no recovery.

Mr. Molloy testified at some length about the fact that this kind of case, as the Court knows, is the kind of case where plaintiff's counsel takes them not knowing whether their going to recover any dollars at all, that is a significant and substantial risk, particularly when weighed against the importance of -- as Mr. Molloy pointed out -- advancing the law for, not only this company and employees of this company, but also companies similarly situated, energy companies with employees like Delores Tacke.

There is a significant risk of not recovering, there is also a significant delay, as this Court recognizes, I'm sure, in this case, for example, where we have yet to be paid. And this case was filed much in advance of the trial in November of 2008. So, that is the reason why -- and I think that is where the core of the dispute in this case is -- you have defense lawyers who are paid whether they win or they lose and I would point out, Your Honor, that the Defense has not even considered providing to the Court, apparently, the amount of dollars it has paid to its attorneys.

They are paid, win or lose; they are paid regularly. Mr. Robinson concedes that, that is a significant difference. And so, where Mr. Robinson

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compared lawyers who -- by the way, do not have a similar practice to ours in any way, none of the lawyers who were talked to by Mr. Robinson have a similar practice as ours -- Mr. Robinson admits he did not talk to lawyers such as Tim Kelly, such as Larry Anderson, such as Mike Molloy, who have a similar practice in every respect to Howard Strause and

myself. Instead, he talked to hourly rate lawyers who have an insurance practice, lawyers who have a Workers Compensation practice, which is significantly different. Or in one case, a lawyer who represents primarily unions, again on a billable rate.

Those are not comparable situations. Mr. Molloy is the only person, besides Mr. Strause and myself, who was able to testify about comparable practices, comparable cases. I would point out, in addition, that Mr. Robinson testified that in a recent case -- and by the way, the only case he was able to point to specifically in which he has represented a plaintiff in a wage case was 16 years ago and he did not tell us about the rate in that case. But, in a recent case in which he was a defense lawyer, he described a self proclaimed expert in labor law who sought an award of $250 an hour, which is the rate we are seeking in this case. And points out that that self-proclaimed

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expert in labor law got $200 per hour. He admitted that Howard Strause and I are not self-proclaimed experts in labor law, but that we're actually highly regarded in this area. I would think that on the basis of Mr. Robinson's testimony itself there is justification for the reasonableness of our fee.

There was some testimony and some argument and some suggestion during the depositions and during the briefing that you've seen by Mr. Higgins and Mr. Selby that this wasn't a complicated case; this case was one that, of course, we should have won and in fact we didn't do very well by getting the verdict that we got.

I think it's important to understand, Your Honor, that not only did we get the verdict we got, the Court recognized that liquidated damages were appropriate and that requires significant proof.

In addition, Your Honor, that laid the groundwork for us to be able to settle a subsequent case for a subsequent period of time, on behalf of Ms. Tacke for roughly equivalent amount of money. I'd also point out that, although they mock the necessity of having two lawyers present for this case and working on this case, Mr. Selby has flown out here from Ohio, they needed an out-of-state specialist to bring in, to try this case. They brought in a high priced, out-of-state specialist

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to try this attorney's fees matter. So, there must be something significant and important about this particular case and more complex than they are suggesting to the Court.

I think that a significant amount of time has been spent in depositions and in briefing to this Court talking about the subject of settlement. It's my view, Your Honor, that under Rule 408 that's irrelevant from the outset. I don't intend to spend a lot of time on that unless the Court is especially interested in it. Every single case involves settlement negotiations before trial. If a case is tried, it means the settlement negotiations didn't succeed. But, I want to tell the Court that if that becomes an issue, we would like to talk about that and I'd like to have some testimony on that because the facts represented to the Court is simply inaccurate and not true. So, I'll leave that to

the Court as to whether you're going to pursue this or not.

I guess, Your Honor, the bottom line in this case is, I think that this should be a relatively simple hearing. The question -- there are two questions to be resolved in attorney's fees cases. The factors that the Court is well aware of need to be applied, they have been applied by the experts and I think Mike Molloy, who

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was the only person who was called as an expert who has the relevant expertise, has testified to the reasonableness of the number of hours; that's questions number one. Don Robinson has testified to the reasonableness of the number of the hours and the Defendant's have not taken issue with the number of hours. So, that issue really is off the table.

The only question is, whether or not our rate, which we claim to be $250 per hour is reasonable. Don Robinson claims that, because he and other defense attorneys get $200 an hour and he will concede up to $215 an hour and are paid regularly with no risk of not being paid whether they win or lose, that plaintiff's attorneys should get the same hourly rate. If that's comparing apples and oranges, many, many courts have recognized that, some of the cases that we've attached to our Affidavits have pointed that out to the Court. And so, our position, Your Honor, is that the Defendant's have simply failed to prove that our claim of $250 per hour is unreasonable.

Thank you.

THE COURT: All right, thank you.

Mr. Selby.

MR. SELBY: Thank you, Your Honor.

I think it is inaccurate to state that the

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Defendant is not challenging the number of hours worked. I think a more accurate statement would be to say that we don't believe that the evidence and the Affidavits that they've submitted setting forth the number of hours that they claimed to have worked in this case satisfies the burden they have. I don't think there is any way that Defense can make a determination as to whether the number of hours they have claimed to have worked is reasonable given they haven't provided any of the detail. Attorney Robinson, the expert -

THE COURT: Let me stop you there for just a minute because I'm interested in this subject. Obviously, the Defense was preparing, attending the same depositions, preparing the same case for trial; you have some idea of the amount of time the Defense put in to prepare this case for trial. So, although the Plaintiff, you know, has the burden of proof and often has to do more work, is there something to suggest in a defense preparation of the case that the hours that the Plaintiff's attorneys are setting forth are out of line in comparison?

MR. SELBY: It would be purely speculation from the perspective of preparing witnesses for depositions,

doing research, you know, range of plus or minus 100 hours. Yes, I'm not saying that this is

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completely out of the ballpark; but, you know, plus or minus 100 hours can be, you know, at $250 an hour, a significant amount of money. And so, you know, the fact that this may be in the ballpark doesn't mean that they've met their burden.

The cases are very clear to state that: "Must support it's request by providing contemporaneously timed effort reflecting for each attorney, the date, the hours expended, and the nature of the work done." There has been nothing submitted along those lines. These -- when you talk about looking at these fees, to make that inquiry, you look at the reasonableness of those entries, you know, one of the issues of duplication of effort.

There are certainly aspects of this case where it was appropriate that they had two lawyers involved. Without seeing a detailed breakdown, we don't know if they had two lawyers researching the same issue, two lawyers doing the same prep work for the same deposition. It's purely speculation as to how that happened. The purpose of having those detailed billing records is to look at those and make those type of appropriate determinations. And the caselaw is clear that the burden is on the plaintiff to submit that information; and they chose not to submit that.

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information. To say whether 403 numbers represents the reasonable hours expended in this case, from our perspective, would be purely speculation. And saying that that's in the ballpark is not saying that's the reasonable number for which they should be compensated. And it's not what the cases say should be compensated. And I think based on the record before this Court, there isn't sufficient evidence to justify the number of hours worked.

With respect to the hourly rate that they are seeking, the expert testimony of Don Robinson has been submitted to this Court as well for consideration. He opines that the hourly rate in this case should be lower than the $250, which the Plaintiff's are seeking. I think that that — if you look at what is reasonable in the community, what has been awarded, what is being charged by other attorneys, and the information he's provided, $250 an hour is not supported.

And I'll note to the Court that the Montana Supreme Court, in a recent case decided earlier this month in July in which Ms. Best was seeking attorney's fees for a plaintiff who was challenging termination by the Cascade County Sheriff's Office in retaliation for supporting an unsuccessful sheriff's candidate, the Court approved it's award based on $220 an hour, in that

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case. So, within the last month, the Montana Supreme Court has said $220 is an appropriate hourly wage for Attorney Best. It's not an overtime case, but it is an

employment related case. I note in that case, based on what was reported in the Montana Law Week Digest discussing the case, that the county in that case did not object to the $220. So, there is, you know, an additional, I guess, evidence from what is a reasonable hourly rate in the community as consider by the Montana Supreme Court. And I think that case was Edwards versus the Cascade County Sheriff's Office.

With respect to the last issue and with respect to the settlement, I guess the fact that the case didn't settle isn't the basis for the position. It is that their demands early on in the case, during the first months of this case, the demand which they had made was for $155,000 plus attorney's fees. The problem that you have with a demand that like is the $155,000 they were seeking in settlement was actually more than they could have received in their best case scenario. The damages that they came in and ask the jury for were between $60,000 and $70,000 in actual damages for three years, it would have totaled in that 60 plus thousand dollar range, double that in liquidated damages, you get between 130 and 140; they're asking for 155.

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By asking for more than they could get if they won the case, they put it in a position where the case must go forward and therefore inflating the attorney fee request. So that's the basis of the argument. That it wasn't that the case didn't reach a settlement, it's that the figures that were being sought exceeded what could even be recovered.

And I think those are really the three issues we have here. One, I don't believe they've established the sufficient record to support a reasonable award of attorney's fees based on the information they've provided. They haven't met what the caselaw says is there burden to provide. I think the hourly rate they're seeking, $250 an hour, if the Court determines that some award is appropriate, it is too high and I think no further than what the Montana Supreme Court has said earlier this month. And I think with respect to that settlement posture that those are the three issues we have with respect to attorney's fees.

THE COURT: All right, thank you.

Ms. Best, do you want to respond?

MS. BEST: Thank you, Your Honor.

First of all, at page 37 of Mr. Robinson's deposition, line 16, I asked:

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"Right, and I just want to be clear with the Court, you are not testifying that the number of hours we have claimed are unreasonable, correct?

"Answer: Correct."

That's their expert, that's the only evidence. There is not a court in this State that I'm aware of, Your Honor, that has required plaintiff's counsel to produce billing and time records. And Mike Molloy testified and I challenge them to come up with a plaintiff's attorney who will testify in the contrary, and certainly

not submitted this to the Court, that plaintiff's counsel in this state, at least, don't do that. We end up reconstructing, most of us, if not all of us, prefaced on a contingent fee basis and that's how hourly rates are considered by courts.

The only question is whether the hourly rate and our claims are reasonable. They have already conceded in their briefing and through their expert that our hours are reasonable. Once again, inaccurate and incomplete information has been provided to the Court. The Edwards case was a 2004 case, 220 was what was claimed because that was the rate at the time that was claimed. Some water has a passed under the bridge since that time and the rate has increased for all of us and Don Robinson recognized that in his Affidavit

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The settlement commentary provided by Mr. Selby, again, is not complete, Your Honor. I'm still not certain that it's relevant. If the Court wants to hear on that point from us, we can provide some sworn testimony. I don't see how it goes to any of the factors that the Court should be considering as to what the appropriate hourly rate should be, but Mr. Strause, in particular, I think can provide some testimony that can make the facts more clear about what happened during those settlement negotiations.

I would make one point, however. The amounts that were being discussed were amounts to the locally -- not only the claim that this Court presided over, but also the subsequent claim, which was settled because of the verdict in the first case. So, I think that if we're

going to be making those types of aspersions, we want to be entirely and completely accurate with the Court.

Judge, do you want to hear any testimony on the settlement that you haven't --

THE COURT: I think that only -- there was one case that talked about settlement position and in that case, the Court concluded that the parties had made a completely -- I can't recall the exact language of it -- but they basically said that they had made -- the

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claims submitted was a specious settlement claim that it was out of the ballpark of what the claim could have ever potentially been worth. And the judge then went on to tirade plaintiff's counsel at what a terrible job they had done during the trial and how the verdict was exactly what the judge thought it was going to be at the end. I don't think I have those types of facts here. And from my perspective, I have not seen anything that would indicate to me that this case fits within the parameters of that discussion.

And so, I don't think I need to hear more as far as the settlement of the case is concerned. There are many, many factors that go into settling cases and negotiations and mediation for process of settling a claim; that frankly, often times, when the case is settled and the jury comes in, there's no semblance of comparison between the two. Often times people -- plaintiffs leave hundreds of thousands of dollars on the table and often times the defendants wished they would have settled for what they had the opportunity to settle for. So, I think the only relevance in a

particular case, the Court feels that they're basically that the whole process of trying a case was a sham in order to orchestrate large attorney fees, I think that the Court may be able to consider

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that as a factor, but having watched this case from the beginning, I don't think that's the scenario that this case has to look at, as far as the trial in this matter. So, I don't think I need to hear anything more about the settlement negotiation processes.

MS. BEST: Thank you, Your Honor.

THE COURT: I guess the only other thing, Ms. Best, just for clarification of the record since you and Mr. Strause are under oath. In regards to this issue of having two attorneys attend certain depositions, but more in the realm of research, can you indicated to the Court that there was no duplication of effort between you and Mr. Strause in regards to preparation for hearings and writing of briefs and research between the two of you.

MS. BEST: Yes, Your Honor, I can unequivocally tell you that and I'm glad you brought that up. You had the opportunity to watch us during the settlement of the instructions, you had the opportunity to watch us as we examined witnesses and I think it's fair to say that we spent our time wisely, we were efficient, we didn't waste the Court's time, we tried to be tight with our arguments, tight with our examinations, and tight with our presentations to the Court; that's exactly how we spent our time when we

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weren't in the courtroom. We did collaborate. If one of us wrote a draft, the other one would look at it and comment or edit, but we're both old enough, we both have enough gray hair that we're not going to just do the same things for fun; we have enough to do.

THE COURT: All right, thank you.

MR. SELBY: Your Honor?

THE COURT: Yes, go ahead.

MR. SELBY: One additional issue: Just for the record with respect to the settlement issue. I would like to just proffer a May 19th, 2006 letter from Howard regarding settlement.

MS. BEST: A May 19th what?

MR. SELBY: Just like to proffer it for the record. There's a copy here.

MS. BEST: Well, then I think we probably better ought to put all the correspondence in, if the Court's going to accept that.

THE COURT: Well, I'll let you decide what you want to do here, but it appears, at least, if you're going to -- none of this happened in a vacuum, there was, I think, a litany of paper going back and forth here.

MS. BEST: I think this is just irrelevant under Rule 408, Your Honor. And we would ask this Court

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not to consider it.

MR. SELBY: And Your Honor, also one clarification on Don Robinson, his testimony. Later in the deposition at page 49, he was asked:

"You aren't telling the Court that you think my claim for the number of hours that I have done is unreasonable or overblown or not credible, are you?"

And he answered:

"I'm not saying it's not credible at all, I just think there is no way to know or have a basis for accuracy, which I think the Court should have some basis of accuracy for the amount of work claimed. And so, you may have actually submitted documentation, I don't know, I haven't seen it, and I didn't see any after your Affidavit."

MS. BEST: What page is that?

MR. SELBY: Page 49, lines 11 through 22. Just to clarify that he wasn't saying he didn't object to the hours, just he had no basis for making a determination.

MS. BEST: Well, let me just go on to page 50 then, Your Honor. Okay, I want to know if you're --

COURT REPORTER: Please read it slower.

MS. BEST: Page 50, line 19 -- and I

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apologize for this, it's just very uncomfortable for us to have to prove to the Defense lawyers that we're credible or believable.

"Okay, I want to know if you're telling the Court if I am not to be believed?

"Answer: No, I would never say that."

MR. SELBY: And Your Honor, I just want to clarify: We are not -- we're not saying that they're not credible and that they didn't work the hours they're saying, but simply saying we worked 403 hours doesn't establish that those hours were reasonably expended in response to the litigation. That it's not just the number of hours the attorneys worked, it's the number of hours they reasonably worked and without the detailed records that the courts -- that the cases detail, there's no way to make a determination of whether that total number of hours was reasonable. So, that's the position.

MS. BEST: Well, since it's our burden, Your Honor, I'll ask the for the indulgence of the last word.

THE COURT: Go ahead.

MS. BEST: I think that's where our reputation comes in and the Court is well aware of that. And the Court has had an opportunity to observe how

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reasonably we expended our time during the trial and we ask that the Court apply that observation to making a determination about the fees in this case.

THE COURT: All right, thank you.

As I indicated to you, I did read everything that was submitted to the Court, the Affidavits, the arguments of counsel, and other cases that you've cited to me and I want to be able to -- although it won't be necessarily eloquent -- be able to give you a ruling today from the bench so that you can move forward here.

The requirements here are quite straight forward as far as how they're set out. However, the Devil is in the details. And in this case, the Court has to make specific findings to determine what is a reasonable attorney fee. There is no question that the Plaintiff was, in fact, the prevailing party and as such, they're entitled to reasonable attorney fees pursuant to statute. And the issue of reasonableness is basically one for the Court to determine. The general accepted standard for a starting determination of a reasonable fee is to take the number of hours reasonably expended and multiply that by a reasonably hourly rate, which is then known as the "Little Star Fee." [sic] Couldn't find anywhere that came up with why they termed it that way, but that's the name that they have given it. And

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the Court's required to determine whether the entire "Little Star" [sic] amount is reasonable by considering

seven general factors and I'm going to walk through those best that I can here based on the record.

The first is the amount and character of services rendered and the second is the labor, time, and trouble involved and those two are somewhat interchangable. I tried to distinguish between the two as much as I could. I looked at -- as far the labor, time, and trouble involved, I went through the court file in detail and ferreted out the services that were rendered here on behalf of the Plaintiff's Counsel. Obviously, they began by researching and formulating and drafting a Complaint. And then, formulated and prepared extensive discovery requests; prepared several affidavits in this matter. There were motions that were researched, formulated, and drafted including summary judgment motions that went to hearing and motions in limine; multiple motions in limine, that were put together. They were obviously researching, formulating, and preparing responses to all of the Defendant's briefs, which there were several in this case and Defendant's motions in limine. There was a trial brief that was researched and drafted; a pretrial ordered. There was also jury instructions; and consultation with

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experts preparing for and presenting at the pretrial hearings in this case and post-trial hearings, which included liquidated damages hearing; and this hearing as well. In addition, there was trial preparation and -- preparation. There was a jury trial that was four days long and the time involved in conducting that jury trial. And the time for today's hearing and the post-trial proceedings that we've had as well.

In regards to the type of case this involved and the time and trouble involved, obviously this case was hotly contested by Energy West. There was a great deal of trial preparation put into this case.

The type of character, I guess, of services rendered would be where the Court would look at how its assessment of Counsel's performance fit within this matter. The Court does find that the briefing and argument of Counsel was -- I would put it in the above average category; and frankly, I would do so on both sides of this matter. This was a very well-prepared and well-litigated case, but the Court is to look at performance of Plaintiff's Counsel at this hearing. And I think the services performed by Counsel were substantial and time consuming and necessary in order to advance the Plaintiff's case here.

I don't find that there was -- that I have

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many, many cases where counsel file 12 briefs when two would suffice and this wasn't one of those cases. I didn't find any issue of failure to use time wisely or find any briefs that were not necessary to promote the Plaintiff's viewpoint of the case.

As far as the additional issues that are important to the amount and character of the services rendered, this was a labor law case. The Plaintiff's had taken the case on a contingency case basis. And as far as the circumstances, they were against a major employer with significant resources to bear of the case at hand.

The Court's also required to consider the character and importance of the litigation and the amount involved or the value of the property effected. Certainly, in terms of what types of cases, all people in this room have seen, this is not a huge money case, but in relative terms to the wage that the Plaintiff received. The eventual judgment in this matter was approximately $70,000, which is more than an entire years wages to this particular Plaintiff. So, to the Plaintiff involved, this was a substantial amount of money and a substantial recovery to her.

In addition to that, the courts have recognized that in regards to the prosecution of wage

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claims that the service provided by counsel, in the general terms, in these types of cases is important and has been likened to a private attorney general function that counsel serves to generally safeguard the rights of the independent worker. The courts have also recognized the fact that, generally speaking, the types of persons that are seeking wage claim recovery do not have the funds available to hire counsel on an hourly basis and are -- by necessity, seek out counsel that will provide them a contingency fee services, without having to front money in order to get their case into court.

And so, as to the character and importance of the litigation, I think that the general -- there's some general import to wage claim cases on behalf of the general public and certainly, to this particular Plaintiff. There was a great deal of importance to her.

The professional skill and experience called for in this matter: There's been discussion about how complex this litigation was or was not. Certainly, this is a concentrated area of the law in which few will wage into. There are very few attorneys in Great Falls, even the State of Montana, that specialize in this area of the law. The Court's experience with Ms. Best and Mr. Straus is that they are one of the few firms and individual attorneys that will, in fact, take these

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types of cases; and that frankly, make a significant part of their practice in this area of the law. This is, I think, a specialized area of the law that has some complex intermingling of state and federal legislation and regulation. And so, I don't think it's the type of case that any general practitioner can become involved in; or if they do, they're going to have a fairly steep learning curve in order to do so successfully.

The Court is also required to consider the character and standing in the profession of the attorneys involved. And as indicated by Mr. Molloy and also set forth in the Plaintiff's Affidavit, Ms. Best has approximately 25 years of experience and has specialized in this area of the law; is highly respected in that regard; has served on the Board of Trustees of Montana Trial Lawyers, is past president of that association; is chairman of the board of the Montana Labor Appeals.

Mr. Straus has been in practice even longer than that and also has specialize in this area of law; has the same type of credentials to bear as Ms. Best. And so, both of the Counsel in this matter are, I think, of

upmost regard and are probably some of the most skilled counsel that the Plaintiff could have hired to represent her in this claim. The Court has nothing to

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indicate that they duplicated any effort in this matter and certainly has no cause to believe that either one would present to this Court an affidavit of attorney's fees that is not substantiated in their practice before this Court.

The Court also concludes that the attorneys did provide skillful and substantially above average representation in this matter. And as far as that factor, I think that that is more than provided for.

The last is the result secured. The judgment in this matter was approximately $35,000. The liquidated damages provision bumped that up to approximately $70,000; and as indicated, that amount is substantial to Ms. Tacke. And according to, also the testimony of Mr. Molloy, a reasonable and successful verdict.

The Defense, essentially, had a couple of arguments. One was that the Plaintiff should be required to substantiate the amount of their fees by specificity, as is common with firms that, for example, provide defense work. And although I think that, certainly, that may be helpful at the point in time that the attorneys come in at the end of these cases and ask for compensation, I don't believe that the caselaw goes so far as to indicate that that is an essential

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requirement. What the cases say is that the plaintiff can provide testimony and evidence in the form of testimony and affidavit to indicate the amount of time that they worked and what they were doing.

The record here, that I've gone through as far as what was filed within the court file, substantiates a significant amount of time that the Plaintiffs have spent. The Court also has personal knowledge of the four days of jury trial plus what would be, at least, several days of pretrial hearing and preparation for those hearings.

And so, in looking at the totality of the evidence before this Court, the Court finds -- and I do have sufficient evidence to make a determination as to whether or not the request for the hours that have been submitted here are in fact reasonable. And the determination of the Court is that I believe that the claim for hourly -- for the hours that have been asserted here has been a reasonable claim based on the evidence that is before the Court.

The next issue the Court has to decide is whether or not the hourly rate that's been requested is reasonable. I have considered the testimony of Mr. Robinson and I've also considered the testimony of Mr. Molloy; and frankly, the experience from the bench

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as to the types of attorney fees the Court sees submitted here. I think that the general premise that Defense Counsel and general practitioners charge

approximately $180 to $215 per hour is probably in the ballpark of reasonableness as to what the going rate is for those attorneys in that type of practice.

The law does allow for the Court to consider the fact that plaintiff's counsel, who takes cases on a contingency fee basis, has significant risks that defense counsel or anyone that's billing hourly does not have to forebear; that is that plaintiff's counsel takes a case on a hope and a prayer that they're going to see the case through either settlement or through verdict that's going to make their time worth it's while. And they take a risk that the costs that are expended, which are substantial in the cost of depositions and time that they take to prepare are going to come to fruition. They also have to forebear the recovery of fees for, in many cases unless there's an early settlement, a significant period of time, which ends up being years in many cases -- the Court will note that this is a 2005 case, it's now 2009, so we're four years down the road and Plaintiff has yet to see a penny from this case.

The Court, because of those circumstances, has the opportunity to indicate that that risk is worth

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something. The question is, how much of an increase above the normal fees of recovery is that worth. There have been several cases that have been pointed out to me that have been in the 225 to 250 range for settlement of attorney fees by the Court. The recent case of Edwards, although that was something that was stipulated so it doesn't help the Court a lot because the Supreme Court wasn't assessing the issue of attorney fees, that was a rate that was stipulated by

the county and the government entities involved as a reasonable rate for this same particular attorney.

The Court notes that there have been several other courts recently that have made the determination of attorney's fees in regards to Ms. Best and in the area of $225 have allowed that type of recovery.

In assessing all of the factors this Court has to assess here, the Court does find that, taking into consideration the testimony of both experts and all additional information that this Court has to bear on the subject, that the reasonable attorney fee, hourly rate here, is that this Court finds to be reasonable is the amount of $225 per hour.

The Court then -- I have not done the math here because frankly I'm not good at it and especially not good at it under pressure. And so, I will apply the

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$225 an hour to, it's now 9:50 so this hearing has gone close to one hour, so the -- as I understand it, Ms. Best, you can correct me if I'm not right, the original request on the Affidavit was 405 hours plus 19.5 hours and I'm going to round that out to an additional 20.5 hours for Ms. Best and Mr. Strause at 397 -- is that right, 397.14 hours.

MR. STRAUSE: I think that's right. Ms. Best, was it down -- I wasn't sure.

MR. STRAUSE: It was.

THE COURT: All right, 397.14. And Mr. Strause, you indicated you had an additional --

MR. STRAUSE: Five hours.

THE COURT: Five hours. I'm including the hearing. I will round you up to the .14 so that that 398 plus 5.

All right, and in regards to the issue of costs involved: Ms. Best, do you have a total for the Court that I need to put into the order? I have those from Mr. Molloy.

MS. BEST: I know we filed them.

THE COURT: All right, that's fine, I can get it. In fact, I know I have it attached here. I will get it to you and get a summary order out to you, hopefully by the end of today so that you can go forward

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here however you wish.

And with that said, I want to personally thank all of you for your professionalism in this trial. It's not something that the Court should have to thank people for; but frankly, I find it refreshing and this was an interesting case to be tried and I thought it was tried extremely professionally on both parties behalf and I want to personally thank you for that.

All right, thank you.

MR. SELBY: Thank you.

MR. STRAUSE: Thank you, Your Honor.

MS. BEST: Your Honor, before we go off the record, there were costs in the previous record -- in the previous order that were already addressed.

MR. SELBY: They've already been approved by the Court.

THE COURT: All right, so --

MS. BEST: The Mike Molloy costs have not yet been addressed.

THE COURT: Is that the only additional, just so I'm right?

MR. STRAUSE: I had in my Affidavit, I put my costs on that also.

THE COURT: Okay. So between the Affidavit and Mike Molloy's I should be able to get -- correct

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that.

MS. BEST: Yes, Your Honor.

THE COURT: All right, I will do that.

MS. BEST: Thank you, Your Honor.

(Whereupon, the Hearing was concluded at 9:55.)

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CERTIFICATE OF REPORTER

STATE OF MONTANA)
) ss.
County of Cascade)

I, Sandra M. Francetich, Court Reporter and Notary Public for the State of Montana, residing in Great Falls, Montana, do hereby certify:

That the foregoing transcript is a true and accurate record of the proceeding given at the time and place hereinbefore mentioned;

That the proceedings were reported by me in machine shorthand and thereafter reduced to typewriting using computer-assisted transcription.

I further certify that I am not an attorney nor counsel of any of the parties, nor a relative or employee of any attorney or counsel connected with the action, nor financially interested in the action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of this the 26 day of September, 2009.

/s/ Sandra M. Francetich
Sandra M. Francetich
Court Reporter
Notary Public, State of Montana
Residing in Great Falls, Montana.
My Commission expires: 08-28-2011

(Seal)